BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARLAND KEITH LUCAS	)	
Claimant	)	
	)	
VS.	)	
	)	
HOWE BAKER ENGINEERS	)	
Respondent	)	Docket No. 1,026,835
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 4, 2008, Award entered by Special Administrative Law Judge John Nodgaard. The Board heard oral argument on December 19, 2008. Randy S. Stalcup, of Wichita, Kansas, appeared for claimant. D. Steven Marsh, of Wichita, Kansas appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) found that claimant's injuries did not arise out of and in the course of his employment with respondent. Further, the SALJ concluded that claimant did not give notice of his alleged injury within the 10-day period and also failed to show just cause to extend the time limitation to 75 days. Accordingly, the SALJ denied claimant's claim for workers compensation benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of whether he suffered an injury that arose out of and in the course of his employment with respondent and whether he gave respondent timely notice of his injury.

Respondent argues that claimant did not meet his burden of proving that he suffered personal injury by accident that arose out of and in the course of his employment with respondent, failed to provide timely notice of his alleged injury, and failed to show just

cause to extend the reporting period to 75 days. In the event the Board finds that claimant's accident is compensable, respondent argues that claimant should be limited to an award of 10 percent whole body impairment for injuries to his low back, based on the rating opinions of Dr. Pedro Murati and Dr. Paul Stein. Respondent contends claimant did not prove he suffered injuries to his upper extremities. Respondent also requests the Board accept the findings of Karen Terrill that claimant had, at most, a 9 percent wage loss and, therefore, is not entitled to work disability benefits.

The issues for the Board's review are:

(1) Did claimant suffer personal injury or injuries by accident that arose out of and in the course of his employment with respondent?

(2) If so, did claimant provide respondent with timely notice of his accident?

(3) If the Board finds this claim to be compensable, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant was hired by respondent on July 22, 2005, as a structural iron foreman. His duties were to hire and run the crew and put up structural iron on two units going up at a refinery. There has been some confusion as to the date of accident.[1] Claimant testified at the regular hearing that he is alleging a date of accident of September 6 or 7, 2005, but claimant's counsel alleged an accident date of September 7, 2005. On the day he claims to have been injured, he and his crew were hanging the floor decking of a unit. The piece of steel they were putting in place weighed approximately 4,000 pounds and had to be pried into place and bolted. Problems developed, and he grabbed a pry bar, jumped onto a pillar, stretched his leg over to the wall and crammed the pry bar into position. When the panel of steel was in the correct position, claimant released his bar. When he stepped down, he felt a sharp burning pain in his low back. While all this was happening, a safety manager was yelling at claimant on the radio saying she needed one of the crew members in the safety office immediately. Claimant said at the time he was worried about whether his crew was okay and then had to deal with the safety manager. He was taking his sister to the airport that day and had arranged to leave work early, and he left right after

[1] The claimant's Application for Hearing, Form K-WC E-1 filed January 3, 2006, alleged injuries to his "[b]ack, both arms, both legs" on October 1, 2005. The Application for Preliminary Hearing, Form K-WC E-3 filed January 11, 2006, likewise alleged a date of accident of October 1, 2005. At his February 23, 2006, discovery deposition, claimant could not recall his date of accident. (pg. 18) At the March 14, 2006, preliminary hearing, claimant testified that he injured his back on September 28, 2005, but the ALJ found the date of accident to be September 7, 2005. At claimant's September 24, 2007, deposition, the date of accident was treated as being September 7, 2005. Claimant's submission letter to the ALJ filed July 12, 2008, alleged a date of accident of September 7, 2005.

the incident. He claims he consequently did not report his injury to anyone at work before leaving.

Claimant had mechanical problems with his pickup truck while making the trip to the airport. When he woke up the next morning, he felt sore. However, he needed to repair his pickup so he called in to work and said he was going to stay home and work on his vehicle. Sandra Weber, respondent's timekeeper, came to claimant's residence to get keys from him so his crew could get into their toolboxes. There is no evidence that Ms. Weber was a supervisor or someone authorized to received notice of accident for respondent.

While claimant was working on his pickup, the hood came down, hitting claimant in the head and crunching his neck. The hood did not strike his back. At the preliminary hearing, he testified that the hood had fallen on his head just before Ms. Weber arrived at his home to pick up the keys. He testified he told her that the hood just fell on him and that he had already been sore and stiff. He testified he told her he had pulled on his back the day before when prying on the reformer deck. At the regular hearing, claimant testified that Ms. Weber picked up the keys at 9 a.m. but that the hood did not fall and strike him until that afternoon.

The day after the hood fell on his neck, September 8, 2005, claimant called in to work. He said that he would not be in to work because he was stiff, was hurting down his back, and was having trouble getting out of bed. He mentioned the incident with the hood falling on his neck. Claimant has not returned to work for respondent.

On September 12, 2005, claimant went to the Veterans Hospital in Wichita complaining of low back, shoulder and neck pain. Claimant reported that his pain had started the Wednesday before, which would have been September 7. He did not report an injury. Under the segment for chief complaints, the records states: "Popping sounds are heard when [patient] twist[s] to lower back and grinding felt in his neck."[2] An x-ray of claimant's lumbar spine was taken on September 26, 2005. The x-ray was interpreted as showing: "Slight narrowing of L4-L5 and L5-S1 interspaces with some anterior osteophyte formation at both levels. Remainder of the study within normal limits."[3]

Claimant said when he was at the VA, he was given some Ibuprofen and told to return at a later date. However, the waiting period to get in to see a doctor at the VA was too long, and he went to the emergency room of Susan B. Anthony Hospital in El Dorado on October 21, 2005, complaining of "ongoing back pain x 2 weeks, getting worse."[4]

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[2] Stipulation filed June 27, 2008, records of Robert J. Dole VA Hospital, pg. 100.

[3] *Id.* records of Robert J. Dole VA Hospital, pg. 3.

[4] *Id.*, records of Susan B. Anthony Hospital, pg. 20.

Claimant reported that his legs went numb and his knees buckled, causing him to fall. Claimant was diagnosed with sciatica and was given a prescription for pain medication. The records do not indicate that claimant mentioned either an accident at work or the incident involving the hood of his vehicle falling on his head and neck. Claimant testified that the emergency room doctor told him he thought his condition was work related. However, claimant testified that at the time he was not thinking about whether his problems were work related; he was hurting and scared because he had fallen.

Claimant returned to the emergency room on October 27, 2005. He was still having low back pain and was also complaining of pain and numbness in his left lower extremity. He asked for more pain medication at a higher dose. Claimant was again diagnosed with sciatica. He was advised to seek follow up treatment with Dr. Jason Williams. He was given a note signed by the emergency room doctor that stated: "I saw this patient on 10/21/05. He has sciatica and may have been injured on the job 2 weeks earlier."[5] Claimant said he turned this slip over to respondent on November 1, 2005, and admitted this was the first notice respondent had that he was claiming a work-related injury. He claims that previous to that he thought his problems had been caused by the hood of his pickup falling on his neck.

Dr. Williams treated claimant from November 1, 2005, to September 8, 2006. He testified that claimant had degenerative disc disease but could not say whether it was caused by his job or was a natural part of aging. Dr. Williams did not believe that the hood falling on claimant's neck would have caused a bulging disc because bulging discs seem to be related to chronic rather than acute events.

Dr. Pedro Murati is a certified independent medical examiner who is board certified in electrodiagnostic medicine and physical medicine and rehabilitation. He saw claimant on October 16, 2006, at the request of claimant's attorney. Claimant's chief complaints were low back pain with occasional radiation into his legs with tingling and numbness in his feet. He also said he had occasional shooting pains with tingling and numbness in his bilateral hands and fingers but was no longer having those symptoms. He told Dr. Murati that he had a previous work-related injury that resulted in bilateral carpal tunnel releases.

After examination, Dr. Murati diagnosed claimant with low back pain with symptoms of radiculopathy and recurrent carpal tunnel syndrome. Dr. Murati opined that claimant's current diagnoses are within a reasonable medical probability a direct result of his work-related injury at respondent. Using the AMA *Guides*,[6] he rated claimant as having a 10 percent whole person impairment for low back pain secondary to radiculopathy. Dr. Murati also rated claimant as having a 5 percent permanent partial impairment to his right upper

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[5] *Id.*, records of Susan B. Anthony Hospital, pg. 12.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

extremity, which converts to a 3 percent whole body impairment, and a 5 percent permanent partial impairment to his left upper extremity, which converts to a 3 percent whole body impairment.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on March 29, 2007, at the request of respondent. Claimant's chief complaint was back pain. He told Dr. Stein that he had no history of back problems. He had work-related bilateral carpal tunnel syndrome in 1997. He was in a motor vehicle accident in 1998 or 1999 and sustained a concussion but did not injure his neck or back.

After examining claimant, Dr. Stein felt that his complaints suggested the possibility of symptom magnification, either conscious or unconscious. The report of the MRI scan did not indicate nerve root compression. Dr. Stein's physical examination of claimant, however, was consistent with a left S1 radiculopathy. This did not explain claimant's complaints of severe pain in the back, the bilateral lower extremity symptoms, or complaints of numbness with buckling and falling. But it might explain claimant's left lower extremity pain and left foot numbness. Dr. Stein also believed the distribution of claimant's complaints was suspect. Based on the AMA *Guides*, Dr. Stein rated claimant as being in the diagnosis related estimate Category III with a 10 percent whole person impairment.

Jerry Hardin, a human resource consultant, met with claimant on December 13, 2006, at the request of claimant's attorney. The consultation was completed by telephone on January 18, 2007. Together they compiled a list of 94 tasks that claimant performed in the 15-year period before his work-related accident. At the time claimant and Mr. Hardin met, claimant was earning a wage of approximately $100 per week. Using a pre-injury wage of $1,200 per week, Mr. Hardin computed that claimant had a wage loss of 92 percent.

Karen Terrill, a rehabilitation consultant, met with claimant on March 29, 2007, at the request of respondent for the purpose of providing an opinion in regard to his loss of wage earning capacity. Based upon Ms. Terrill's evaluation of claimant's education, training, experience and permanent work restrictions of Dr. Stein, she opined that claimant could perform the work of a construction manager. She opined that, at most, claimant would have a wage loss of 9 percent.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7]

[7] K.S.A. 2007 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the

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[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

> employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

In considering whether just cause exists, the Board has listed several factors which must be considered: (1) the nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually; (2) whether the employee is aware he or she has sustained an accident or an injury on the job; (3) the nature and history of claimant's symptoms; and (4) whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

ANALYSIS

Claimant failed to report his alleged accident of September 7, 2005, until November 1, 2005. This was more than the 10 days required by statute but within the 75 days the statute allows where there was just cause for the delay in giving notice. Claimant contends there was just cause for his failure to give notice within 10 days and, therefore, his time should be extended to 75 days. His explanation for not giving notice is that he was not sure his injuries were work related. This issue was presented to the ALJ at preliminary hearing and on appeal to a member of this Board, who found:

> Claimant states that he felt something in his low back when he suffered the alleged accident on what he now believes was September 6 or 7. He also says that he felt low back pain and stiffness before working on his truck and that he only injured his head, neck and upper back when the hood of his truck fell on him. Yet claimant also contends that there was just cause for his failure to report his work injury within ten days because he was unaware that the low back injury occurred at work and was not due to the truck hood falling on his head. And it was only when a doctor explained to him that he could not have injured his low back by having a truck hood land on his head that claimant was able to make the connection between the incident at work and his low back condition. Claimant's explanation for his failure to give notice within ten days is not persuasive. Furthermore, claimant said on the recorded message of September 8 that he injured his low back while working on his truck.
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> . . . I had to work on my truck yesterday and in doing so I twisted wrong or pulled something or something. And I am down on my back really bad. I can't hardly–I could barely crawl out of bed and barely, just walk to the bathroom.[10]

[10] P.H. Trans. at 36.

> The Board finds claimant has failed to prove just cause for not giving notice of accident within ten days. Accordingly, his claim is barred.[11]

The Board, having now considered the entire record again concludes that there was not any justification or cause for claimant's failure to report his accident within 10 days. His time for giving notice should not be extended to 75 days. As such, his notice was out of time.

CONCLUSION

Claimant failed to give timely notice to respondent of his accident. His claim is barred. Because of this finding, the other issues in this appeal are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John Nodgaard dated September 4, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
John Nodgaard, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge

[11] *Lucas v. Howe Baker Engineers*, No. 1,026,835, 2006 WL 2632027 (Kan. WCAB Aug. 29, 2006).